87-663

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERALD GREENWALD, M.D.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

LAWRENCE S. GREENWALD,
WILLIAM D. GRUHN,
GORDON, FEINBLATT, ROTHMAN,
HOFFBERGER & HOLLANDER,
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233 E. Redwood Street,
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Attorneys for Petitioner.

OF COUNSEL:
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Miami, Florida 33129.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Whether petitioner was denied due process and equal protection of law when the Florida Board of Medical Examiners revoked his license to practice medicine without having established standards required by statute for the disposition for disciplinary cases.

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

OPINIONS BELOW 1

JURISDICTION. 2

CONSTITUTIONAL PROVISIONS AND STATUTES. 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT . . . 7

The Writ Should Be Granted To Resolve A Split In the Circuits And To Decide Whether A Licensing Authority Must Establish And Apply Standards Required By Statute In Revoking A Physician's License..

CONCLUSION. 13

APPENDIX. . . . . .

Final Order Of The Board of Medical Examiners and Recommended Order. A.1

Opinion Of District Court Of Appeal Of Florida, Third District A.57

Order Of Supreme Court Of Florida Denying Petition For Review A.60

Fla. Admin. Code, Rule 21M-20.01 . . . . . A.62

TABLE OF AUTHORITIES

Cases

Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983). 10

Holmes v. New York City Housing Authority, 298 F.2d 262 (2nd Cir. 1968) 9

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 9

Rice v. Department of Health and Rehabilitation Services, 386 So.2d 844 (Fla. 1st DCA 1980) . . . 7

Solimena v. State, Department of Pari-Mutual Wagering, 402 S.2d 1240 (Fla. 3rd DCA 1981). 7

Southern Co-Op Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983). 9-10

Constitution, Statutes and Rule

U.S. Constitution, 14th Amendment . 2

28 U.S.C. §§1257(3) 2

Section 458.331(1)(c), Fla. Stat. (1983). 2,5

Section 458.331(2), Fla. Stat. (1983). 3

Section 458.331(4), Fla. Stat. (1983). 4,8

Fla. Admin. Code Rule 21M-20.01 . . 8

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OPINIONS BELOW

The revocation of petitioner's license was ordered in the Final Order of The Board of Medical Examiners dated July 3, 1986, which adopted the hearing officer's Recommended Order. These are printed in the Appendix. (A.1)

The only judicial opinion below was a per curiam opinion of the District Court of Appeal of Florida, Third District, filed on February 3, 1987, and docketed as Gerald Greenwald, M.D., v. Department of Professional Regulation, Case No. 86-1845, January Term, A.D. 1987. That opinion is printed in the Appendix. (A.57)

By Order dated July 24, 1987, the Supreme Court of Florida declined to accept jurisdiction, and denied the Petition for Review. The Order is printed in the Appendix. (A.60)

JURISDICTION

The judgment sought to be reviewed was entered on July 24, 1987, when the Supreme Court of Florida denied the Petition for Review. Jurisdiction is conferred upon this Court by 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law...

Section 458.331(1)(c), Fla. Stat. (1983) provides in pertinent part:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsec-

tion (2) may be taken:

> (c) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.

Section 458.331(2), Fla. Stat. (1983) provides:

> (2) When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:
>
> (a) Refusal to certify to the department an application for licensure.
>
> (b) Revocation or suspension of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not to exceed $1,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the physician on probation for a period of time subject to such conditions as the board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician.

Section 458.331(4) Fla. Stat. (1983) provides:

The Board shall by rule establish guidelines for the disposition of disciplinary cases involving specific types of violations. Such guidelines may

include minimum and maximum fines, periods of supervision or probation, or conditions of probation or reissuance of a license.

STATEMENT OF THE CASE

On July 3, 1986, petitioner's license to practice medicine in the State of Florida was revoked by the Board of Medical Examiners. The Board purported to act pursuant to Sec. 458.331(1)(c), Fla. Stat. (1983), which authorizes various forms of discipline, including revocation, for being convicted of a crime which directly relates to the practice of medicine or to the ability to practice medicine. A plea of nolo contendere is considered a "conviction" for purposes of that statute.

The revocation resulted from a plea of nolo contendere by petitioner to a charge of solicitation to murder his

former wife. (T. 126; see T. 7). Adjudication was withheld in the criminal proceeding (T. 125; R. 514), and petitioner was placed on probation. (T. 7). Administrative charges primarily based on the plea of nolo contendere were then brought against petitioner, and these resulted in revocation. (A.1)

Petitioner then appealed to the Third District Court of Appeal of Florida. Among other things, he contended that the Board violated his rights to due process and equal protection, because no standards had been established for the disposition of disciplinary cases even though by statute the Board was required to establish them "by rule". Brief of Appellant at 33-42.[1] On February 3,

---

[1]Under Florida law, the court, in an appeal from an administrative ruling, "may consider any 'freshly raised' questions of law, constitutional or

1987, the Third District Court of Appeal issued a per curiam opinion, in which it affirmed the revocation. (A.57) The opinion did not contain any discussion of petitioner's contention that the Board's failure to establish and apply standards violated his constitutional rights.

Thereafter, petitioner sought review in the Supreme Court of Florida. By Order dated July 24, 1987, that court denied the Petition for Review. (A.60)

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS AND TO DECIDE WHETHER A LICENSING AUTHORITY MUST ESTABLISH AND APPLY STANDARDS REQUIRED BY STATUTE IN REVOKING A PHYSICIAN'S LICENSE.

This appears to be a case of first impression before this Court.

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otherwise." Solimena v. State, Department of Professional Regulation, Division of Pari-Mutual Wagering, 402 So.2d 1240, 1245 N.6 (Fla. 3rd DCA (1981); see also, Rice v. Department of Health & Rehabilitative Services, 386 So.2d 844, 849-50 (Fla. 1st DCA 1980).

There are no standards in the applicable statutes which control when revocation should be ordered, as opposed to such lesser discipline as suspension, fine or reprimand. Recognizing the absence of any such standards, the Florida legislature directed that "the board shall by rule establish guidelines for the disposition of disciplinary cases involving specific types of violations." Section 458.331(4), Fla. Stat. (1983).

Contrary to this clear mandate, the board had failed to establish any such standards when it revoked petitioner's license.[2] It is submitted that by imposing the most

---

[2]The board had adopted Fla. Admin. Code, Rule 21M-20.01, which identifies "factors" which the licensing authority may consider in determining disciplinary action, but which utterly fails to follow the statutory mandate to "establish guidelines for the disposition of disciplinary cases involving specific types of violations." This rule is printed beginning at A.62.

severe penalty without first adopting and applying the standards required by statute, the board violated petitioner's rights to due process and equal protection.

At least three circuit courts of appeal have held that due process requires standards in a statutory scheme which governs the grant or denial of a license or other valuable property right. Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) (due process and equal protection rights violated by absence of "reasonable regulations promulgated by the board... of the objective standards which had to be met to obtain a license"); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968) ("due process requires that selections among applicants be made in accordance with 'ascertainable standards'"); Southern Co-op Development Fund v. Driggers, 696

F.2d 1347, 1351-52, 1355-56 (11th Cir. 1983) ("persons similarly situated should be able to obtain plat approval upon meeting uniform standards").

At least one circuit has held otherwise. Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983) ("'even the outright violation of state law by local officials' in denying a license does not automatically raise a federal claim").

In the case at bar, the adoption and application of standards easily could have made the difference between revocation and another form of discipline. It was undisputed that petitioner, consistently with the highest standards of the medical profession, had given generously of his time and skill over the years to treat without charge those who could not afford his services. Indeed, the judge

at the sentencing hearing in the criminal case noted:

> "I've read over fifty letters from people. There's a letter here that says that for many years they found your medical practice and ethics to be above and beyond reproach, and 95 percent of the letters I received said the same thing, exactly the same thing. Spectrum House, which is a rehabilitation, drug rehabilitation program, which I'm a firm believer in, they talk about all the time you donated to them, free of charge, donated it.
>
> The Phyllis Wheatley school and the Alexander School; these are young kids we're talking about that you took care of for nothing, for free.
>
> Police officers, three of them. Susan Bell, from South Miami, she wouldn't go to you because she couldn't afford it, but you

> called her up and told her to come to you anyway and you treated her for free, didn't want a nickel, not one dime.
>
> William Richter from the Air Force, same thing. All the work you did for free, and you have their thanks.
>
> Major Brookins from the Department of the Treasury, same thing. Same type of letters.
>
> The Cancer Foundation, same thing. Exact same thing."

R. 508-509. It also was undisputed that the alleged crime arose out of an extraordinarily bitter divorce, and the circumstances were an aberration in petitioner's life. Although it is impossible in hindsight to know whether the application of standards would have made a difference, they certainly could have; and depriving petitioner of his

right to practice medicine without having adopted and applying standards was a grave injustice of constitutional dimension.

CONCLUSION

By reason of the foregoing, this case is worthy of review.

Respectfully submitted,

Lawrence S. Greenwald

William D. Gruhn

Gordon, Feinblatt, Rothman,
Hoffberger & Hollander
Attorneys for Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GERALD GREENWALD, M.D.,
Petitioner

v.

STATE OF FLORIDA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

APPENDIX

BEFORE THE BOARD OF MEDICAL EXAMINERS

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

DOAH CASE NO.85-1989
VS. DPR CASE NO.0052038

GERALD GREENWALD, M.D.,

Respondent.

DOAH CASE NO.85-1990
DPR CASE NO.0048282

FINAL ORDER OF THE
BOARD OF MEDICAL EXAMINERS
[July 3, 1986]

THIS CAUSE came before the Board of Medical Examiners (Board) pursuant to Section 120.57(1)(b)(9), Florida Statutes, on June 7, 1986, in Tallahassee, Florida, for the purpose of considering the Hearing Officer's Recommended Order (a copy of which is attached hereto) in the above-styled cause. Petitioner, Department of Professional Regulation, was represented by Stephanie A. Daniel, Esquire;

Respondent was present and represented by Lawrence E. Besser, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board accepts and adopts the Recommended Order in toto.

WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) Respondent shall be, and hereby is, reprimanded for the violation of advertising under a name other than his own;

(2) Respondent shall pay an administrative fine in the amount of $1,250;

(3) Respondent's license to practice in the state of Florida is hereby REVOKED;

(4) Counts 3 and 4 of the Administrative Complaint in DPR Case No. 0048232 and Count 2 of the Administra-

tive Complaint in DPR Case No. 0052038 are dismissed.

This Order takes effect upon filing.

DONE AND ORDERED this 1st day of July, 1986.

BOARD OF MEDICAL EXAMINERS

/S/
WILLIAM F. BRUNNER, M.D.
Chairman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Orders has been provided by certified mail to Gerald Greenwald, M.D., Dadeland Medical Building, 7400 North Kendall Drive, Miami, FL 33156 and Lawrence E. Besser, Esquire, SAMEK AND BESSER, 1925 Brickell, Suite #D-207, Miami, FL 33129 and by interoffice delivery to Stephanie A. Daniel, Esquire, Department of Pro-

fessional Regulation, 130 North Monroe Street, Tallahassee, FL 32301 at or before 5:00 P.M. this 3rd day of July, 1986.

/S/

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION (BOARD OF MEDICAL EXAMINERS),	)
Petitioner,	)
DOAH CASE NO.85-1989 DPR CASE NO.0052038	)
vs.	)
GERALD GREENWALD, M.D.,	)
Respondent.	)
DOAH CASE NO.85-1990 DPR CASE NO.0048232	)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in these two consolidated cases on February 10 and 11, 1986, at Miami, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. The parties were represented at the hearing by the following counsel:

FOR PETITIONER:

Stephanie A. Daniel, Esquire
Senior Attorney
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32301

FOR RESPONDENT:

Lawrence E. Besser, Esquire
SAMEK AND BESSER
1925 Brickell
Suite #D-207
Miami, Florida 33129

ISSUE

The issue in this case is whether disciplinary action should be taken against Gerald Greenwald, M.D., based upon the alleged violations of Chapter 458, Florida Statutes, as contained in the two Administrative Complaints filed against the Respondent on June 3, 1985.

BACKGROUND

On June 3, 1985, the Petitioner filed two Administrative Complaints against the Respondent alleging that Respondent had violated Section

458.311(1)(c), Florida Statute by being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine; Section 458.331(1)(d), Florida Statutes, by being guilty of false, deceptive or misleading advertising; Section 458.331(1)(e), Florida Statutes, by advertising, practicing or attempting to practice under a name other than one's own; Section 458.331(1)(h), Florida Statutes, by failing to perform any statutory or legal obligation placed upon a licensed physician, and more specifically violating Section 455.227(1)(c), Florida Statutes, which provides that a licensee may be disciplined if the licensee has been convicted of a felony which relates to the practice of his profession; Section 458.331(1)(l), Florida Statutes, by

making deceptive, untrue or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine when such scheme or trick fails to conform to the generally prevailing standards of treatment in the medical community; Section 458.331(1)(u), Florida Statutes, by employing any procedure or prescribing any therapy which, by the prevailing standards of medical practice in the community, would constitute experimentation on a human subject without first obtaining full, informed and written consent; and Section 458.331(1)(t), Florida Statutes, by committing gross or repeated malpractice or failing to practice medicine with the level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions or circumstances.

The alleged statutory violations were based upon factual allegations that Respondent advertised his medical practice in the 1984 yellow pages of Miami, Florida, under the name Dadeland Dermatology Center without listing Respondent's name in the advertisement as the responsible physician; Respondent, in the same yellow pages, advertised the use of Silicone and Collagen implants when Respondent did not have Collagen in this office and encouraged the use of Silicone, instead of Collagen; and Respondent pleaded nolo contendere to a criminal charge of solicitation of first degree murder.

At the formal hearing, the Petitioner agreed to voluntarily dismiss charges that Respondent had violated Section 458.331(1)(u), Florida Statutes, which prohibits any procedure or prescribing any therapy which, by the prevailing standards of medical practice

in the community, would constitute experimentation on a human subject without first obtaining full, informed and written consent; and Section 458.331(1)(t), Florida Statutes, by committing gross or repeated malpractice or failing to practice medicine with the level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

Subsequent to the formal hearing, a transcript of the proceedings at hearing was filed with the Division of Administrative Hearings on February 28, 1986, and, by previous ruling, the parties were allowed ten days from that date within which to file any post-hearing submissions with the Hearing Officer. Both parties timely filed proposed findings of fact and conclusions of law, as well as separate

memoranda of law. All of the parties' post-hearing submissions have been carefully considered in the formulation of this Recommended Order. A specific ruling on each finding of fact proposed by both parties is included in the Appendix which is attached to and incorporated into this Recommended Order.

FINDINGS OF FACT

Based upon the stipulations of the parties, on the testimony of the witnesses, and on the exhibits received in evidence at the hearing, the following facts are found.

1. Respondent is, and has been at all times material hereto, a licensed physician in the State of Florida having been issued license number ME 0015097. Respondent's last known address is Dadeland Medical Building, 7400 North Kendall Drive, Miami, Florida 33156.

2. In the yellow pages effective as of May 10, 1984, in Miami, Florida, Respondent placed an advertisement wherein Respondent advertised the "Dadeland Dermatology Center," which is located at 7400 Kendall Drive, in Miami, Florida. Despite the fact that Respondent practices medicine at the Dadeland Dermatology Center, the advertisement placed by Respondent in the Miami, Florida yellow pages and in effect on May 10, 1984, does not anywhere list Respondent's name. In December of 1978, Respondent applied pursuant to the fictitious name statute with the Secretary of State of the State of Florida to do business under the name of "Dadeland Dermatology Center."

3. In the yellow pages for the City of Miami, Florida, effective as of May 10, 1984, Respondent also placed an advertisement under the heading "Physicians & Surgeons - M.D.-

Dermatology (Skin)" under the name Gerald Greenwald, M.D., P.A. In the advertisement, Respondent advertised that Respondent provided Silicone and Collagen implants. The Silicone and Collagen implant therapy was advertised among a list of several other conditions/treatments which Respondent dealt with in his practice. The specific phrase "Silicone & Collagen implants" was italicized and set forth in larger type and in capital letters.

4. The above-described advertisements for "Gerald Greenwald, M.D., P.A." and for "Dadeland Dermatology Center" were contained on the same page of the City of Miami, Florida, yellow pages, in effect on May 10, 1984. Pursuant to Respondent's instructions, any member of the public who called his office, pursuant to either advertisement, was immediately informed that they were

calling the office of Gerald Greenwald, M.D.

5. Despite the fact that Respondent advertises that he provides Silicone and Collagen implants in his practice, Respondent has never purchased Collagen, has never used Collagen in his practice, and has never participated in the training program sponsored by the manufacturer and distributor of Collagen. Further, despite his statements to patients that he can obtain Collagen, Respondent has never had any intention of using Collagen because he is convinced that it is an inferior product when compared to medical grade Silicone.

6. Collagen is a purified form of cow skin, that is used to stimulate the formation of scar tissue, which then raises the surface underneath which it is injected. It is used by removing and softening wrinkles and lines. Collagen

is a foreign substance and as such can cause allergic reactions, as well as exacerbation of certain diseases. Because it can cause allergic reactions, Collagen may be used only after appropriate allergy reaction skin testing has been performed.

7. Silicone is a chemical that is commonly present in the form of sand. Medical grade Silicone has been used in injectable form to correct lines, wrinkles, and depressions in the body. The primary problems which occur with administration of Silicone are the problems of lumps and bumps caused by improper administration of the substance, which should only be injected in very small or "pin head" amounts.

8. Before providing Collagen therapy, allergy testing is necessary, as previously described above. A small amount of Collagen is injected under the skin and examined closely for a period

of three days and then re-examined after one month. If no reaction occurs, Collagen may be injected in the patient for purposes of removal of facial wrinkles and lines. It is, of course, necessary to have Collagen available in order to provide the allergy testing because the substance is used in the allergy tests.

9. Zyderm Corporation is the only corporation that manufactures Collagen for distribution in the United States. Respondent has never ordered Collagen from Zyderm Corporation and has never participated in the training program for Collagen provided by Zyderm Corporation. Furthermore, Respondent has never had in his office the Collagen necessary to perform allergy testing on those patients seeking Collagen treatments.

10. If a Miami, Florida, physician were to place an order for Collagen with Zyderm Corporation, it would take

between four to seven days to obtain the substance.

11. Collagen therapy is not a permanent treatment. Repeated injections will be required as the Collagen is absorbed by the body. Silicone, on the other hand, is more permanent. Because Collagen is not a permanent treatment, for the most part permanent problems will not result from improper administration of the substance. If Silicone is improperly administered, lumps and bumps and sagging may occur.

12. Respondent is of the opinion that Collagen is much inferior to Silicone and that intelligent people, when informed about the merits of Silicon and the deficiencies of Collagen, will invariably choose Silicone.

13. It is false, deceptive, and misleading for a physician to advertise that he provides both Collagen and

Silicone implants when he does not have Collagen readily available but would have to order the substance, resulting in a delay of between four to seven days, and the physician does have Silicone readily available. It is also false, deceptive, and misleading for a physician to advertise that he provides both Collagen and Silicone implants when he has never had any intention of using Collagen because he has never taken any training in the use of Collagen and thinks it is an inferior product.

14. During the summer of 1984, DPR investigator Diane Robie, pursuant to Respondent's advertisement, telephone the Respondent to discuss the possibility of having Collagen treatment for the lines around her eyes. Investigator Robie was informed on the telephone, prior to her visit to Respondent's office, that Respondent preferred the use of Silicone to

Collagen because it was more effective and less expensive. When investigator Robie visited Respondent's office, the Respondent discussed the relative advantages and disadvantages of both Silicone and Collagen. While the Respondent did not exert any undue pressure on investigator Robie to make a decision about whether or not she would decide to be treated, Respondent made it clear that he thought that if she chose to be treated, the treatment should be Silicone. During investigator Robie's visit, the Respondent also told her that if she still wished to have Collagen treatments, Respondent could obtain Collagen for her. Investigator Robie left the Respondent's office and did not arrange for any further appointments. Investigator Robie did not pursue what the Respondent's course of conduct would have been if she had persisted in her request for Collagen treatment.

15. At all times material hereto, Respondent was the owner of an insurance policy taken out on Paula Greenwald, Respondent's ex-wife, which would pay $1.09 million in proceeds in the event of Paula Greenwald's death. Respondent also had a $3.5 million insurance policy on himself for the care of his children in the event of Respondent's death.

16. In 1983, Respondent went through divorce proceedings terminating his marriage to Paula Greenwald. At the time of the divorce, there were six children ranging from seven to seventeen years of age. The divorce proceedings brought out a great deal of acrimony on both sides. After the divorce, Mrs. Greenwald was to have custody of the children and Respondent perceived that Mrs. Greenwald was, on a number of occasions, denying Respondent's visitation rights. Due to those disputes and disputes about other matters, the

relationship between Respondent and Mrs. Greenwald became severely deteriorated after the divorce, continually worsening until about September of 1984. In approximately September of 1984, Mrs. Greenwald sent Respondent a card which contained an anonymous death threat. There was no evidence presented to establish that this death threat was acted upon.

17. At a time prior to September 15, 1984, the Metro-Dade County Organized Crime Bureau received information from an Eastern Airlines employee named Mr. Armstrong, indicating that Respondent was trying to put out a contract for the death of Mrs. Greenwald. Mr. Armstrong obtained the information which he provided to the Metro-Dade County Organized Crime Bureau from another Eastern Airlines employee, Thomas Young. No one from the Metro-Dade County Organized Crime Bureau ever

discussed the information directly with Mr. Young until after the arrest of the Respondent.

18. Acting on the information received from Mr. Armstrong, Detective Paul Ohanesian went to the Respondent's office undercover posing as a patient, Paul DeSantis, on or about September 15, 1984. Ohanesian had sun spots on his back and used this as the reason for visiting Respondent's office. On the same day as Ohanesian's first visit, the Respondent became engaged to be married. When the Respondent's first wife heard about the engagement, she threatened to hurt Respondent like he had never been hurt before, and also threatened to break up his relationship with his fiancee.

19. During the course of the office visit which occurred on or about September 15, 1984, Respondent examined Ohanesian's (DeSantis') back, diagnosed

his condition, prescribed medication for the condition, and suggested that Ohanesian (DeSantis) return in one week.

20. At the outset of the office visit which occurred on or about September 15, 1984, Ohanesian told Dr. Greenwald that "(a) couple of guys down at the Union down at Eastern Airlines sent me (Ohanesian) here."

21. During the course of the first office visit, Ohanesian said, "they said that ah, you had some expensive marital problems." This initiated a conversation between Respondent and Ohanesian about Respondent's marital problems. After some discussion, Ohanesian made the statement "(s)ounds to me like it's time to get rid of her." Respondent responded as follows:

Greenwald - You can't deal with it
Ohanesian - Yeah
Greenwald - It's a...She's nuts
Ohanesian - Yeah
Greenwald - She's nuts
Greenwald - And I like, ya know, if I had the ability...

Ohanesian - Ya
Greenwald - To commit the perfect crime I'd kill her. She deserves to be dead
Ohanesian - Well
Greenwald - She's a one of the few truly evil ....
Ohanesian - Ya
Greenwald - People I know. But what the hell
Ohanesian - Hey, sometimes there's people that will do it for you though
Greenwald - Yeah but the first one they're gonna come in on look to is me.

Respondent then proceeded to tell Ohanesian that if someone would kill Respondent's ex-wife and then come to Respondent a month or two later, Respondent would give the person $50,000. Respondent told Ohanesian that he (Respondent) could not make a contract because the police and the FBI would look to Respondent. Respondent informed Ohanesian that he had told Mrs. Greenwald that if Respondent thought he could get away with it, Respondent would have his wife killed. Then Respondent again told Ohanesian that if someone killed his wife and came to him after-

wards, it would be worth a lot of money to Respondent.

22. Nothing further of significance occurred during the first office visit dated September 15, 1984, which is described above. No contract was entered into. However, Ohanesian, still known to Respondent as Paul DeSantis, was directed to return to Respondent's office and an appointment was scheduled for September 22, 1984.

23. On or about September 22, 1984, Ohanesian returned to Respondent's office still using the name Paul DeSantis. Respondent examined Ohanesian and again prescribed medication.

24. During the course of the office visit which occurred on or about September 22, 1984, Respondent initiated a conversation about his marital problems and informed Ohanesian that he (Respondent) had received a death threat from Mrs. Greenwald. In response,

Ohanesian asked Respondent if he was still serious about having Mrs. Greenwald killed. The conversation continued as follows:

Greenwald - Ya know, I can't tell you that I'm serious...
Ohanesian - Ya
Greenwald - ... because that would be conspiracy. I don't know if you're a cop or private, ya know, I don't know that stuff.
Ohanesian - Ya, ya
Greenwald - Ah, but it would certainly ah, behoove the world and be of great financial benefit to me if she were gone.

Then Respondent proceeded to tell Ohanesian that his wife and her friend liked to jog at Coral Reef Park at six in the morning. Respondent described the location of the park. Respondent gave Ohanesian a description of Mrs. Greenwald's vehicle. Respondent provided Ohanesian with his wife's address and a description of Respondent's wife and her friend.

25. During the course of the above-described conversation, the method of payment came up as follows:

Ohanesian - Yeah. Well, that's all right.

Okay, ahm. If I give a, you a post office box, ya know, if something should happen.
Greenwald - Uh hum.
Ohanesian - Just send it in the post office box, if you can just jot it down for yourself. Okay, it's gonna go to J and M
Greenwald - Uh hum
Ohanesian - Box 523816. That's in Miami, 33152. Okay, well, ah, I'll guess you know anyways. So, you won't need much proof.
Greenwald - Whataya mean?
Ohanesian - Ahm, if she dies you won't need much proof
Greenwald - No, no, I certainly won't. Ahm,

Respondent, in the course of the same conversation also stated:

Greenwald - So, I'm not in a conspiracy. Ahm, I'm telling you like I've probably told fifty people....
Ohanesian - Uh hum
Greenwald - ... that the world would be better, better off without her. And I would be grateful.
Ohanesian - Right
Greenwald - And it's as simple as that.

26. Nothing occurred during the second office visit to establish a clear-cut contract. At the conclusion of the office visit, Respondent told Ohanesian that in ten days his (Ohanesian's) spots would be gone and the treatment would be finished. Respondent did not direct Ohanesian to return to his office for another visit after September 22, 1984.

27. On or about September 26, 1984, Ohanesian returned to Respondent's office still using the undercover name Paul DeSantis. Ohanesian told Respondent that people were always getting run over by stolen cars. Then Ohanesian asked for expense money to run over Mrs. Greenwald. The conversation was as follows:

Ohanesian - Like kids that steal cars then run over joggers all the time. I can't put out any of my own money, you know? So, we need some expense money. Is there going to be any way we can do, work something out here?

Greenwald - How much expense money do you need?
Ohanesian - Uh
Greenwald - And how do I know you're not a cop?
Ohanesian - I'm not, Doc. You know this isn't the movies, you know? What am I going to do? I mean, well?
Greenwald - All right, How much expense money?
Ohanesian - I'm talking about eight hundred dollars.
Greenwald - Eight hundred bucks. You got a look at her?
Ohanesian - I got a good look at her, she looked at me.
Greenwald - All right, how do you make sure that, uh, that uh, she's run over?
Ohanesian - Well, she's going to get run over real good, I mean, you know? She's going to be jogging. She didn't jog Monday and uh, I'm just going to run her over. Run the shit off of her, and that's going to be the end of it.
* * * * * * * *
Ohanesian - When can you get me some money?
Greenwald - Uhm!
Greenwald - You got no recorders or microphones?
Ohanesian - No, shit no. Shit the only thing is the gun
Greenwald - Take it, there.

At that time, Respondent gave Ohanesian $800 cash out of Respondent's wallet.

28. After discussing expenses, Respondent and Ohanesian talked about

payment of the fifty thousand dollars as follows:

Ohanesian - Uhm, when I'm gone, okay. I know you're scared, just send it in this envelope, okay?
Greenwald - How much money do I send in?
Ohanesian - After it's over?
Greenwald - Yeah
Ohanesian - Fifty thousand we talked about, less whatever you're going to pay me now
Greenwald - All right now. Fifty thousand
Ohanesian - Uh huh
Greenwald - It's fine. It's a lot of money, but it's fine. I want you to know that it is from insurance that I have
Ohanesian - Okay
Greenwald - I don't have fifty grand that I could give you now
Ohanesian - No, I don't want, we made an agreement when I first came in here. You send it after its' over with. Did you say a month?
Greenwald - Whenever I get...
Ohanesian - Okay
Greenwald - .... the insurance check.

Ohanesian and Respondent then talked about Mrs. Greenwald's schedule for the week in question.

29. On his patient records for DeSantis, dated September 26, 1984, Respondent wrote "Improving. Finish above..."

30. At the time Respondent paid the $800 cash to Ohanesian (DeSantis) it was Respondent's intent to hire Ohanesian to kill Respondent's ex-wife, Paula Greenwald, and Respondent believed that he had hired someone to accomplish that purpose. This action of hiring someone with the motive of and for the purpose of causing the death of another person demonstrates that Respondent is a person who is extremely cruel, callous, and unfeeling. Those characteristics can affect clinical judgments and therefore relate to the ability to practice medicine. Further, the act of soliciting a patient to commit murder is poor medical judgment.

31. On or about September 27, 1984, Respondent was arrested for solicitation to commit first degree murder. John Collins, a sergeant with the Metro-Dade Organized Crime Bureau, was one of the arresting officers.

Sergeant Collins, upon arresting Respondent, advised Respondent only that he was under arrest for solicitation to commit murder. No further information was provided. Respondent was not advised of his Miranda rights because no questioning was to be pursued at that time. Respondent then asked Sergeant Collins if "she" was dead.

32. On or about October 16, 1984, under case number 84 22607, an information was filed against Respondent in the Eleventh Judicial Circuit Court in and for Dade County, Florida, alleging that Respondent between September 14 and 28, 1984, did unlawfully and feloniously solicit Paul Ohanesian to commit murder in the first degree, and in the course of such solicitation did command, encourage, hire or request Paul Ohanesian to kill Paula Greenwald, and to effect her death with premeditated design.

33. On or about January 23, 1985, Respondent pleaded nolo contendere to charges of solicitation to commit murder in the Circuit Court for Dade County. On or about January 23, 1985, the court accepted Respondent's plea of nolo contendere to charges of solicitation to commit murder.

34. On or about January 23, 1985, a sentencing hearing was held in Case Number 84-22607, before the Circuit Court in Dade County, Florida. As a result of the sentencing hearing, Respondent was placed on probation for a period of ten (10) years. As a special condition of probation, Respondent was to perform 5,000 hours of community service over a ten year period, by performing 500 hours of community service per year for specified organizations. Additionally, as a special condition of probation, Respondent was

to obtain a psychiatric evaluation from one of three specified physicians.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and on the applicable legal principles, the following conclusions of law are made.

1. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. See Section 120.57(1), Florida Statutes, and Section 455.225(4), Florida Statutes.

2. The Board of Medical Examiners is empowered to revoke or suspend the license of, or otherwise discipline, any physician who violates any of the following provisions of Section 458.331(1), Florida Statutes:

> (c) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter;
>
> (d) False, deceptive or misleading advertising;

(e) Advertising, practicing or attempting to practice under a name other than one's own;

(h) Failing to perform any statutory or legal obligation placed upon a licensed physician; and

(l) Making deceptive, untrue or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine when such trick or scheme fails to conform to the generally prevailing standards of treatment in the medical community.

3. Petitioner has the burden of proof in this license discipline case and must prove clearly and convincingly that the alleged violations of the above-cited statutory provisions occurred. Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981); Robinson v. Florida Board of Dentistry, 447 So.2d 930 (Fla. 3d DCA 1984); and Sneij v. Department of Professional Regulation, 454 So.2d 795 (Fla. 3d DCA 1984).

Conclusions regarding charges in

4. Count One of the Administrative Complaint in DPR Case No. 0048232 charges the Respondent with a violation of Section 458.331(1)(e), Florida Statutes, by "[a]dvertising, practicing, or attempting to practice under a name other than his own." There is sufficient competent substantial evidence to establish that Respondent violated Section 458.331(1)(e), Florida Statutes, by advertising under the name Dadeland Dermatology Center, a name other than his own. Respondent in mitigation offered evidence that the Dade County Medical Association did not find unethical behavior in Respondent's advertising. This evidence does not negate, but only mitigates the violation of Section 458.331(1)(e), Florida Statutes.

5. Count Two of the Administrative Complaint in DPR Case No. 0048232 charges the Respondent with a violation of Section 458.331(1)(d), Florida Statutes, which prohibits false, deceptive, or misleading advertising. There is sufficient competent substantial evidence to establish that the Respondent violated Section 458.331(1)(d), Florida Statutes, by advertising in a false, deceptive, or misleading manner that Respondent provided Collagen and Silicone treatments, when in fact the Respondent has never used Collagen in his practice, has never been trained in the use of Collagen, has never ordered Collagen, has never had any Collagen in his office, believes Collagen is an inferior product, and has no present intention of using Collagen. It is clearly false, deceptive, and misleading for the Respondent to advertise the availability of both Collagen and

Silicone treatments when in fact the Collagen treatments are not available at Respondent's office and he has no intention of making them available.

6. Count Three of the Administrative Complaint in DPR Case No. 0048232 charges the Respondent with a violation of Section 458.331(1)(u), Florida Statutes, by

> Performing any procedure or prescribing any therapy which, by the prevailing standards of medical practice in the community, would constitute experimentation on a human subject, without first obtaining full, informed, and written consent.

Counsel for the Department voluntarily dismissed the charges in this count at the commencement of the hearing. Accordingly, Count Three of the Administrative Complaint in DPR Case No. 0048232 should be dismissed.

7. Count Four of the Administrative Complaint in DPR Case No. 0048232 charges the Respondent with a violation

of Section 458.331(1)(t), Florida Statutes, by

> Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

Counsel for the Department voluntarily dismissed the charges in this count at the commencement of the hearing. Accordingly, Count Four of the Administrative Complaint in DPR Case No. 0048232 should be dismissed.

8. Count Five of the Administrative Complaint in DPR Case No. 0048232 charges the Respondent with a violation of Section 458.331(1)(l), Florida Statutes, by

> Making deceptive, untrue or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine when such scheme or trick fails to conform to the generally prevailing standards of

treatment in the medical community.

There is sufficient competent substantial evidence to establish that Respondent violated Section 458.331(1)(l), Florida Statutes, by making deceptive, untrue, or fraudulent representations that Respondent provided Collagen implants in his practice. Essentially, Respondent is advertising that he provides both Collagen and Silicone treatments, when this is not true, and in fact is deceptive in nature.

Conclusions regarding charges in

DPR Case No. 0052038

9. Count One of the Administrative Complaint in DPR Case No. 0052038 charges the Respondent with a violation of Section 458.331(1)(c), Florida Statutes, by

> Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.

The manner in which the last sentence of the above-quoted statutory provision is to be construed and applied was addressed as follows in Ayala v. Department of Professional Regulation, 478 So.2d 1116 (Fla. 1st DCA 1985):

> We find that Section 458.331(1)(c) is clearly constitutional by construing the word "shall" in the last sentence of that subsection as permissive rather than mandatory in meaning. Rich v.

Ryals, 212 So.2d 641, 643. As so construed, the Board of Medical Examiners may presumptively consider the nolo contendere plea as evidence of a conviction for purposes of chapter 458; however, in accordance with the Supreme Court's opinion in The Florida Bar v. Lancaster, 448 So.2d 1019, the Board must allow appellant the opportunity to rebut this presumption and assert his innocence of the underlying criminal charges by explaining the reasons and circumstances surrounding his plea of nolo contendere, and thereby attempt to convince the Board that he is not guilty of a crime in violation of the provisions of Section 458.331(1)(c). The Board must consider this evidence in deciding appellant's guilt or innocence for purposes of the disciplinary charges. Such explanation may, of course, always be considered in mitigation of punishment if appellant should be adjudicated guilty by the Board.

10. At the hearing in this case, the Respondent was allowed an opportunity to rebut the presumption which arises from his nolo contendere plea. Respondent availed himself of the opportunity and attempted to explain the reasons and circumstances surrounding his plea of nolo contendere and attempted to convince the Hearing officer that he is not guilty of a crime

in violation of the provisions of Section 458.331(1)(c), Florida Statutes. As is obvious from the findings of fact earlier in this Recommended Order, the Respondent's efforts in this regard were unsuccessful. After careful consideration of the Respondent's explanations, I have found them to be lacking in persuasiveness when considered in light of the other evidence of the Respondent's guilt of the criminal charge of solicitation of the first degree murder of his ex-wife.

11. Section 777.04(2), Florida Statutes, reads as follows in pertinent part:

> Whoever solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation.....

Upon consideration of the totality of the evidence in this case, there is an abundance of competent substantial evidence that the Respondent encouraged and hired Paul Ohanesian to murder Respondent's ex-wife and that Respondent did so with the motive of and for the purpose of causing the death of his ex-wife. Respondent's explanations with regard to his having had some other motive or purpose are simply unconvincing.

12. Count Two of the Administrative Complaint in DPR Case No. 0052038 charges the Respondent with a violation of Section 458.331(1)(h), Florida Statutes, by "[f]ailing to perform any statutory or legal obligation placed upon a licensed physician." In this regard, the Respondent is alleged to have failed to comply with or to have violated the provisions of Section 455.227(1)(a), Florida Statutes, which

provides for disciplinary action where "[t]he licensee has been convicted of a felony which relates to the practice of his profession." For the following reasons this charge must be dismissed. First, while Section 455.227(1)(a), Florida Statutes, authorizes disciplinary action upon conviction of certain felonies, Section 455.227(1)(a) does not impose any statutory or legal obligation upon a licensed physician (or upon any other licensee). Section 455.227(1)(a) may provide a <u>separate</u> basis for discipline against a licensed physician (or other licensee), but because it does not impose any duty or obligation on licensed physicians, there can be no failure to perform anything required by Section 455.227(1)(a) which could constitute the basis of a violation of Section 458.331(1)(h), Florida Statutes. Second, even if the Respondent had been charged directly with a

violation of Section 455.227(1)(a) [which he was not], such a charge would fail on the facts in this case because Section 455.227(1)(a), Florida Statutes, is limited by its terms to licensees who have been "convicted," and does not contain the broadening language of Section 458.331(1)(c), Florida Statutes, which encompasses situations in which adjudication has been withheld or in which a plea of nolo contendere has been made. Therefore, no violation of Section 458.331(1)(h), Florida Statutes, can be found, and Count Two of the Administrative Complaint in DPR Case No. 0052038 must be dismissed.

Conclusions regarding the appropriate penalty

13. With regard to the violation of Section 458.331(1)(e), Florida Statutes, by advertising under a name

other than his own, even though the Dade County Medical Association found nothing wrong with the Respondent's advertising, the fact remains that the language of the statutory prohibition is simple and clear and the Respondent should have been aware of it. Respondent did mitigate the harm caused by the improper advertising by advising all who called that they had called Respondent's office. Accordingly, for the violation of Section 458.331(1)(e), Florida Statutes, I recommend issuance of a reprimand and an administrative fine in the amount of $250.

14. With regard to the violation of Section 458.331(1)(d) and (l), Florida Statutes, by false, deceptive, or misleading advertising and by deceptive, untrue or fraudulent misrepresentations, I recommend an administrative fine of $1,000.

15. With regard to the violation of Section 458.331(1)(c), Florida Statutes, by being found guilty of a crime which directly relates to the ability to practice medicine, due to the particularly heinous nature of the Respondent's crime, I recommend that Respondent's license to practice medicine be revoked.

RECOMMENDATION

Consistent with all of the foregoing, it is recommended that the Board of Medical Examiners issue a Final Order in this case to the following effect:

(a) Finding the Respondent guilty of the violations charged in Counts One, Two and Five of the Administrative Complaint in DPR Case No. 0048232;

(b) Finding the Respondent guilty of the violation charged in Count One of the Administrative Complaint in DPR Case No. 0052038;

(c) Reprimanding the Respondent for the violation of advertising under a name other than his own;

(d) Imposing a total of $1,250 in administrative fines against the Respondent;

(e) Revoking the Respondent's license to practice medicine; and

(f) Dismissing Counts Three and Four of the Administrative Complaint in DPR Case No. 0048232 and dismissing Count Two of the Administrative Complaint in DPR Case No. 0052038.

DONE AND ORDERED this 10th day of April, 1986, at Tallahassee, Florida.

MICHAEL M. PARRISH,
Hearing Officer
Division of
Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida
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Filed with the Clerk of the Division of Administrative Hearings this 10th day of April, 1986.

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APPENDIX TO RECOMMENDED ORDER
IN DOAH CASE NOS. 85-1989 & 85-1990

The following are my specific rulings on each of the findings of fact proposed by each of the parties.

Rulings on findings proposed by the Petitioner

The paragraphs referred to below are to the numbered paragraphs of the proposed findings of fact which appear at pages 3 through 13 of the Petitioner's Proposed Recommended Order.

The substance of all of the findings proposed in the following paragraphs has been accepted. Some editorial modifications have been made in the interests of clarity and accuracy, as well as when integrating similar proposals by the Respondent: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32.

Paragraph 11: The findings in this paragraph are accepted with the exception of the language in parentheses, which is rejected as not supported by competent substantial evidence.

Paragraph 18: Accepted in substance with unnecessary details deleted.

Paragraph 29: The last sentence of this paragraph is rejected as irrelevant. The remainder of this paragraph is accepted.

Rulings on findings proposed by the Respondent

The paragraphs referred to below are to the numbered paragraphs of the proposed findings of fact which appeared at the following pages of the Respondent's Proposed Recommended Order: 1, 2, 3, 4, 5, 6, 16 and 17, 19 and 20. Inasmuch as the paragraphs of Respondent's proposed findings are numbered in three series of numbers in which many numbers are repeated, I have also included page reference below in the interest of clarity

(Findings proposed at pages 1 through 6)

Paragraph 1: Accepted in substance, with deletion of some irrelevant details.

Paragraph 2: Accepted in substance, with deletion of some irrelevant details.

Paragraph 3: Rejected because not supported by competent substantial evidence.

Paragraphs 4, 5, and 6: The substance of these paragraphs has been accepted with the deletion of certain editorial material.

Paragraph 7: Rejected as constituting either a cumulative rehash of previous findings or as argument about the significance of the findings.

Paragraphs 8 and 9: The substance of these paragraphs has been accepted with the deletion of certain editorial material.

Paragraph 10: Rejected as constituting an irrelevant opinion or a conclusion of law rather than a finding of fact.

Paragraph 11: Accepted in substance.

Paragraph 12, 13, 14 and 15: Accepted in substance.

Paragraph 16: Rejected as contrary to the greater weight of the persuasive evidence. (See other findings regarding the guilt of the Respondent. In making my findings of fact regarding Respondent's intent, motive, and purpose, I have specifically rejected as unpersuasive and unworthy of belief Respondent's testimony that he knew that Ohanesian was not a "hit man", that he believed that Ohanesian was a private detective sent by Respondent's ex-wife, that he had no intention of causing his wife's death, and that his sole reason for paying $800 to Ohanesian was to "send a message" to his ex-wife so she would <u>believe</u> he was serious about having her killed even though he was not.)

Paragraphs 17 and 18: Accepted in substance.

Paragraph 19: Rejected as contrary to the greater weight of the persuasive evidence. (See other findings regarding the guilt of the Respondent.)

Paragraph 20: Accepted in substance.

Paragraph 21: Rejected in part as irrelevant and in part as contrary to

the greater weight of the persuasive evidence.

Paragraph 22: Rejected as contrary to the greater weight of the persuasive evidence. (See other findings regarding the guilt of the Respondent.)

Paragraph 23: Rejected because it constitutes a summary of testimony and argument about the testimony and does not constitute a proposed finding of fact.

Paragraph 24: Rejected in part because it constitutes a summary of the testimony and opinion rather than a proposed finding of fact. Rejected primarily because it is inconsistent with the greater weight of the persuasive evidence, including some of Dr. Jacobson's testimony on cross-examination.

Paragraph 25: Rejected in part because it is irrelevant. Rejected primarily because the opinions of the Board of Directors of the Dade County Medical Association are not warranted on the basis of the persuasive evidence in this record.

Paragraph 26: Rejected as contrary to the greater weight of the persuasive evidence.

(Findings proposed at pages 16 and 17)

Paragraphs 1, 2, 3, and 5: Accepted in substance.

Paragraphs 4, 6, and 7: Although essentially correct statements, these paragraphs are rejected as findings

because they are irrelevant to the issues in this case.

(Findings proposed at pages 19 and 20)

Paragraph 1: The substance of the first sentence is accepted. The second sentence is rejected as contrary to the greater weight of the persuasive evidence or as not supported by persuasive competent substantial evidence.

Paragraph 2: Accepted in substance.

Paragraph 3: The first sentence of this paragraph is accepted in substance. The second sentence is rejected as contrary to the greater weight of the evidence and not supported by competent substantial evidence.

Paragraphs 4, 5, 6, and 7: Accepted in substance.

Paragraph 8: Accepted in substance with some additional clarification regarding the emphasis placed on the benefits of silicone.

Paragraph 9: Accepted in substance.

Paragraph 10: Rejected as not supported by persuasive competent substantial evidence. (See other findings on this subject.)

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND, IF FILED,
DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1987

GERALD GREENWALD, M.D.,	**	
Appellant,	**	
vs.	**	CASE NO. 86-1845
DEPARTMENT OF PROFESSIONAL REGULATION,	**	
	**	
Appellee.	**	

Opinion filed February 3, 1987.

An Appeal from the Board of Medical Examiners.

Samek & Besser and Lawrence E. Besser; Lawrence S. Greenwald (Baltimore, Maryland), for Appellant.

Stephanie A. Daniel, for Appellee.

Before BASKIN and DANIEL S. PEARSON AND FERGUSON, JJ.

PER CURIAM

The main issue in this appeal from an administrative order is whether a conviction for solicitation to commit first degree murder "directly relates to the practice of medicine or to the ability to practice medicine," section 458.331(1)(c), Florida Statutes (1985), so as to form the basis for revoking a license to practice medicine. We reject the appellant's narrow interpretation of the statute in favor of the broader application given by the court in Rush v. Department of Professional Regulation, 448, So.2d 26 (Fla. 1st DCA 1984) (conviction for conspiracy to possess and import marijuana is related to ability to practice podiatry).

In our view Dr. Greenwald's undertaking to end a bitter marriage

dissolution problem by soliciting someone to murder his ex-wife evidences warped judgment and disregard for human life -- the antithesis of that which is required and expected of physicians. See Boedy v. Department of Professional Regulation, 463 So.2d 215 (Fla. 1985) (because of physician's constant interaction with the public, mental fitness and emotional stability are essential traits a physician must possess in order to competently practice medicine).

The order appealed from is in all respects AFFIRMED.

SUPREME COURT OF FLORIDA
CORRECTED
FRIDAY, JULY 24, 1987

GERALD GREENWALD, M.D.,	)
	)
Petitioner,	)
	)
v. CASE NO. 70,170	)
District Court of Appeal,	)
3rd District - No. 86-1845	)
	)
DEPARTMENT OF PROFESSIONAL REGULATION,	)
	)
Respondent.	)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisidiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ERLICH, ACTING C.J., BARKETT, SHAW, GRIMES, and KOGAN, J.J., concur.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

B

cc: Hon. Louis J. Spallone, Clerk

Lawrence E. Besser, Esquire

Lawrence S. Greenwald, Esquire

Lisa S. Nelson, Esquire

RULES
OF THE
DEPARTMENT OF PROFESSIONAL
REGULATION

BOARD OF MEDICAL EXAMINERS

CHAPTER 21M-20
DISCIPLINARY GUIDELINES

21M-20.01 Disciplinary Guidelines.
21M-20.02 Time for Payment of Civil Penalties.

21M-20.01 Disciplinary Guidelines. The Board adopts the following guidelines for discipline for violations of Chapters 455 and 458, F.S. (1979):

(1) For violations of Section 455.221(1)(a), Sections 458.331(1)(d), 458.331(1)(e), 458.331(1)(f), 458.331(1)(o), 458.331(1)(p), 458.331(1)(aa) and 458.331.(1)(bb), F.S. (1979), the Board may impose one or more of the following penalties:

(a) refusal to certify to the Department an application for licensure;

(b) suspension of the physician's license up to five (5) years;

(c) restriction of practice up to five (5) years;

(d) imposition of an administrative fine not to exceed $1,000 for each count or separate offense;

(e) Issuance of a reprimand.

(2) For violation of Sections 455.227(1)(b), 455.227(1)(c), 455.227(1)(d), 455.227(1)(e), Section 458.013 or Sections 458.227(1)(a), 458.227(1)(b), 458.227(1)(c), 458.227(1)(g), 458.227(1)(h), 458.227(1)(i), 458.227(1)(j), 458.227(1)(k), 458.227(1)(l), 458.227(1)(m), 458.227(1)(n), 458.227(1)(q), 458.227(1)(r), 458.227(1)(s), 458.227(1)(t), 458.227(1)(u), 458.227(1)(v), 458.227(1)(w), 458.227(1)(x), 458.227(1)(y), 458.227(1)(z), F.S., (1979), the Board may impose one or more of the following:

(a) refusal to certify to the Department an application for licensure;

(b) revocation or suspension of a license;

(c) restriction of practice;

(d) imposition of administrative fine not to exceed $1,000 for each count or separate offense;

(e) issuance of a reprimand;

(f) placing the physician on probation for a period of time subject to such conditions as the Board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, and to work under the supervision of another physician.

(3) The Board may take into consideration the following factors in determining the appropriate disciplinary action to be imposed:

(a) the severity of the offense;

(b) the danger to the public;

(c) the number of specific offenses;

(d) the length of time since the date of the violation(s);

(e) the length of time the licensee has practiced his profession;

(f) the actual damage, physical or otherwise, to specific patients;

(g) prior discipline imposed upon the licensee;

(h) the deterrent effect of the penalty imposed;

(i) the effect of the penalty upon the licensee;

(j) efforts by the licensee towards rehabilitation; and

(k) any other mitigating or aggravating circumstances.

(4) Ten (10) days after probable cause has been found to exist as a violation of Chapters 455 and/or 458, F.S. (1979), and subsequent to the entry

of a final order by the Board as regards a disciplinary matter, the Board's executive director shall contact or inform a newspaper of general circulation in the area of the physician's practice of the action so that the public may be made aware of such action.

(5) The Board's executive director shall notify appropriate law enforcement agencies and other licensing agencies within this state and within the United States of disciplinary actions taken by the Board. The executive director and the Department are authorized to assist these law enforcement agencies to the extent permitted by law.

Specific Authority 458.331(4), 458.309 FS. Law Implemented 458.331(4) FS. History-New 12-5-79.

21M-20.02 Time for Payment of Civil Penalties. In cases where the Board of Medical Examiners imposes a civil penalty for violation of Chapter 455 or

458, Florida Statutes, or the rules promulgated pursuant thereunder, the penalty shall be paid within thirty (30) days of its imposition by Order of the Board.

Specific Authority 455.227(2), 458.309 FS. Law Implemented 455.227(2) FS. History-New 10-23-80.

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WP14

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-663

In The

Supreme Court of the United States

October Term, 1987

GERALD GREENWALD, M.D.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The respondents submit that the question presented for review would be more accurately stated as:

Whether petitioner was denied due process and equal protection of law when the Florida Board of Medicine revoked his license to practice medicine for violation of section 458.331(1)(c), Florida Statutes, without having established disciplinary guidelines required by statute for the disposition of disciplinary cases.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ISSUE	1
STATEMENT OF THE CASE	1
REASON WHY PETITION SHOULD BE DENIED	1
CONCLUSION	3

TABLE OF AUTHORITIES

Page

CASES

Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983) 2

Holmes v. New York City Licensing Authority, 398 F.2d 262 (2d Cir. 1968) 2

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 2

Southern Cooperative Development Fund v. Driggers, 696 F.2d 1374 (11th Cir. 1983) 2

Street v. New York, 394 U.S. 576 (1969) 1

STATUTES

Section 458.331(1)(c), Florida Statutes ..... i, 1, 3

Section 458.331(2), Florida Statutes 3

ISSUE

The respondent, Florida Department of Professional Regulation, Board of Medicine respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Third District Court of Appeal of the State of Florida. That opinion is reported at 501 So.2d 740 (Fla. 3d DCA 1987).

STATEMENT OF THE CASE

The respondent accepts the statement of the case presented by the petitioner.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The federal constitutional questions were not addressed by the state court.

As petitioner correctly states, the decision of the district court of appeal does not address any federal constitutional issue, but rather, only construes the language of section 458.331(1)(c), Florida Statutes. No federal or state constitutional provision is mentioned. When a state court decision fails to expressly pass on a federal question, it is presumed that the omission was due to a failure to properly present the federal question in the state courts. *Street v. New York,* 394 U.S. 576 at 582 (1969).

2. There is no conflict among the Circuit courts concerning the issue raised by petitioner.

There is not conflict among the United States Circuit Courts of Appeal concerning the issue which petitioner raises; even if such conflict exists, this case is not the appropriate vehicle for review of that conflict. In *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983), the court held that the fact that the Lebanon Planning Board exceeded its review power in denying a building permit did not constitute an infringement of constitutional rights. Any failure to establish standards was not an issue in that case; therefore no conflict exists with the other cases by petitioner.

Nor does the present case conflict with the other cases so cited. In *Southern Cooperative Development Fund v. Driggers,* 696 F.2d 1347 (11th Cir. 1983), the court held that inasmuch as the applicable statutes did not grant the county commission additional discretion to deny a plat permit once specified requirements had been met, denial was a violation of due process. *Hornsby v. Allen,* 326 F. 2d 605, 612 (5th Cir. 1964), deals with the failure to establish standards for the granting or denial of a license, and *Holmes v. New York City Licensing Authority,* 398 F.2d 262, 265 (2d Cir. 1968) deals with a similar issue. In the present case, however, standards for the issuance of a license are not applicable. The standards that are the basis of petitioner's claim are the sentencing guidelines to be applied in determining the penalty to be imposed in a professional license disciplinary proceeding; guidelines that would only come into play following a finding that the physician had violated the provisions of the Medical Practice Act. Further, there is no doubt that the pen-

alty imposed here, revocation, would remain within the discretion of the Florida Board of Medicine for a violation of section 458.331(1)(c), Florida Statutes, pursuant to section 458.331(2), Florida Statutes, with or without the sentencing guidelines. Thus it is clear no conflict exists, and review should be denied.

CONCLUSION

Because no federal constitutional issue was addressed by the appropriate state court, and the questions raised present no conflict with decisions of other federal courts of appeals on the same subject matter, and no important questions of federal law which have not been but should be settled by this Court, respondents respectfully request that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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